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No. 80-304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BENEDETTO J. MASSARELLA,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE APPELLATE COURT OF ILLINOIS,
FIRST JUDICIAL DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the legislative reclassification of the offense of perjury from a misdemeanor to a felony, as applied to petitioner, violates the *ex post facto* prohibition of Art. I, § 10, cl. 1 of the United States Constitution.

II.

Whether petitioner's federal constitutional rights were violated by the trial court's denial of petitioner's motion to sever the perjury count from the remaining counts charging theft and conspiracy.

III.

Whether petitioner's constitutional rights were violated where the Illinois Appellate Court, after a full briefing and oral argument on the merits of petitioner's fifteen issues on appeal, chose not to go into any detail in rejecting six of the said issues.

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OPINIONS BELOW

The opinion of the Illinois Appellate Court, First Judicial District, is set forth as Appendix A to the Petition for Writ of Certiorari. Additionally, the opinion is reported as *People* v. *Massarella,* 80 Ill. App.3d 552, 400 N.E.2d 436 (1st Dist. 1979). It should also be noted that the Illinois Appellate Court had originally reversed petitioner's convictions [*See People* v. *Massarella,* 53 Ill. App.3d 774, 368 N.E.2d 507 (1st Dist.

1977)]; however, the Illinois Supreme Court subsequently overturned that decision and remanded the case to the Appellate Court for consideration of the remaining fourteen unresolved issues. *People* v. *Massarella,* 72 Ill.2d 531, 382 N.E.2d 262 (1978).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari. Petition at 2. However, as treated more fully in the argument portion of this Brief in Opposition, respondents do not believe that petitioner has shown any compelling reason for this Court to grant the requested Writ.

CONSTITUTIONAL PROVISIONS INVOLVED

Art. I, § 10, cl. 1 of the Constitution of the United States provides, in pertinent part, that:

> No State shall . . . pass any . . . ex post facto Law. . . .

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . .

STATEMENT OF THE CASE

This Court is referred to the statement of facts contained in the two Illinois Appellate Court opinions in this case. *See People* v. *Massarella,* 80 Ill. App. 3d 552, 400 N. E. 2d 436, 441-443, 448-450 (1st Dist. 1979) and *People* v. *Massarella,* 53 Ill. App. 3d 774, 368 N. E. 2d 507, 508-509 (1st Dist. 1977), which opinions are reprinted as Appendices A and D to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner seeks a Writ of Certiorari in this cause so that this Court might review the decision of the Illinois Appellate Court, First Judicial District, which affirmed petitioner's convictions and sentences for perjury, theft and conspiracy. *See People* v. *Massarella,* 80 Ill. App. 3d 552, 400 N.E. 2d 436 (1st Dist. 1979). Petitioner raises three arguments in support of his Petition. First, he alleges that his conviction for perjury violated the *ex post facto* prohibition of Art. 1, § 10, cl. 1 of the United States Constitution. Petition at 10-15. Secondly, petitioner alleges that the trial court's denial of his motion to sever the perjury count from the remaining counts charging theft and conspiracy violated his federal constitutional rights. Petition at 16-18. Finally, petitioner argues that his federal constitutional rights were violated when the Appellate Court of Illinois chose not to go into any detail as to the reasons why it rejected six of petitioner's fifteen issues on appeal. Petition at 19-26.

I.

THE LEGISLATIVE RECLASSIFICATION OF THE OFFENSE OF PERJURY FROM A MISDEMEANOR TO A FELONY, AS APPLIED TO PETITIONER, DOES NOT VIOLATE THE *EX POST FACTO* PROHIBITION OF ART. I, § 10, CL. 1 OF THE CONSTITUTION.

Petitioner alleges that his perjury conviction violated the *ex post facto* prohibition of Art. I, § 10, cl. 1 of the federal constitution. Petition at 10-15. He bases his argument on the fact that until January 1, 1973, perjury was considered to be a misdemeanor in the State of Illinois.[1] On January 1, 1973, the Unified Code of Corrections (*Ill. Rev. Stat.*, 1973, ch. 38, § 1001-1-1 *et seq.*) took effect. The Unified Code formally classified perjury as a Class 3 felony (*Ill. Rev. Stat.*, 1973, ch. 38, § 32-2(d)) punishable by a term of imprisonment of from one to ten years. *Ill. Rev. Stat.*, 1973, ch. 38, §§ 1005-8-1(b)(4) and 1005-8-1(c)(4). As a by-product of this felony classification, the concomitant statute of limitations was lengthened from eighteen to thirty-six months. *Ill. Rev. Stat.*, 1973, ch. 38, § 3-5(b).

At the time petitioner committed perjury (*i.e.* August, 1971) the offense was a misdemeanor. The eighteen month statute of limitations would have expired in February, 1973. However, since the Unified Code became effective prior to that date, the new thirty-six month statute of limitations was properly applied to petitioner's case. *See People* v. *Anderson*, 53 Ill. 2d 437, 292 N. E. 2d 364, 366 (1973); *Clements* v. *United States*, 266 F. 2d 397, 398 (9th Cir. 1959), *cert. denied*, 359 U.S. 985 (1959).

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[1] Perjury was considered a misdemeanor since it provided for possible incarceration in a place other than the penitentiary. *Ill. Rev. Stat.*, 1971, ch. 38, § 32-2; *Cf. People* v. *Novotny*, 41 Ill. 2d 401, 244 N. E. 2d 182, 184 (1968 (alternative sentencing provisions in aggravated battery statute rendered offense a misdemeanor).

Petitioner attempts to distinguish this clear-cut authority by arguing that the reclassification of the crime from that of misdemeanor to felony is what actually violated the *ex post facto* prohibition of the federal constitution, as applied to him.[2] Petition at 11. However, it should be noted that under the Unified Code, the penalty provision for perjury actually provided for a lesser maximum term of imprisonment, made work release available for certain periods of days rather than limiting it to certain periods of the day as under former law, and made conditional discharge (*i.e.* non-reporting probation) available for the first time. *Compare Ill. Rev. Stat.,* 1971, ch. 38, § 32-2 *and* ch. 75, § 35 *with Ill. Rev. Stat.,* 1973, ch. 38, §§ 32-2(d), 1005-6-1(b) and 1005-7-1(a). *See also Ill. Ann. Stat.,* 1973, ch. 38, §§ 1005-6-1 and 1005-7-1 (Smith-Hurd) (Council Commentary). This was true even though the crime was classified as a felony. Moreover, the previous classification of perjury as a misdemeanor was due to judicial construction rather than legislative classification.

Since the Unified Code provided for a lesser penalty, petitioner was offered the opportunity to elect to be sentenced under that Code or under the sentencing law as it existed when the offense was committed. *People* v. *Liebling,* 36 Ill. App. 3d 1073, 344 N. E. 2d 520, 523 (1st Dist. 1976). Petitioner voluntarily chose to be sentenced under the new Code (and therefore under the provisions of the new perjury statute). Therefore, the constitutional prohibition against *ex post facto* laws was not violated. *People* v. *Liebling, Id.* at 523. Petitioner had the opportunity to be sentenced under the old law. After being fully advised by counsel, he chose to be sentenced under the new perjury statute. (Tr. 2295-2297, 2302). He cannot

[2] Although petitioner claims a violation of the state constitutional prohibition as well (*Ill. Const. of 1970,* Art. I, § 16), no argument is made that the State prohibition encompasses less than its federal counterpart. Thus, any alleged violation of the State prohibition is solely a matter for state courts to decide and of which this Court need not concern itself.

now be allowed to argue that the effects of the new law will actually operate to his detriment. Furthermore, the fact that petitioner voluntarily chose to be sentenced under the new law serves to distinguish this case from that of *Lindsey* v. *Washington,* 301 U.S. 397 (1937), which is relied upon by petitioner. Petition at 13-14.

In summary, petitioner attempts to circumvent the clear line of authority regarding the extension of statutes of limitations by arguing that the change in classification of perjury from misdemeanor to felony is what is really important. However, as respondents have shown, *given the facts of this case,* petitioner's federal constitutional rights were not violated since petitioner voluntarily chose to be sentenced under the new perjury statute, a statute which was actually beneficial to his interests.

II.

PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO SEVER THE PERJURY COUNT FROM THE REMAINING COUNTS CHARGING THEFT AND CONSPIRACY.

Secondly, petitioner argues that, should this Court accept his position that the perjury prosecution was barred by the statute of limitations, the conspiracy and theft convictions must be reversed as well since the jury was exposed to accusations of other crimes and to inadmissible evidence. Petition at 16-18. Petitioner's argument is without merit.

At the outset, it should be re-emphasized that the perjury prosecution was properly initiated. See Argument I, *supra.* Thus, petitioner's main argument must, of necessity, fail. Nevertheless, petitioner does raise additional arguments which need be dealt with.

Evidence of petitioner's perjurious testimony constituted evidence of a subsequent crime which showed a particular plan or scheme by which the conspiracy and theft offenses were committed. As such, the evidence was clearly admissible. *People* v. *Lehman,* 5 Ill. 2d 337, 125 N. E. 2d 506, 509 (1955); *Drew* v. *United States,* 118 U.S. App. D.C. 11, 331 F. 2d 85, 90 (D.C. Cir. 1964). Furthermore, the perjury evidence also tended to prove the absence of mistake or inadvertence in committing the other offenses, for if such had been the case, petitioner would have had no reason to perjure himself in an action *initiated by him* to enjoin the Illinois Department of Revenue from investigating his illegal activities.

Petitioner further argues that his testimony in the prior civil action, a portion of which was read to the jury (Tr. 1234-1239), would not have been admissible but for the perjury charge and was in improper form in any event. However, petitioner's testimony was admissible, even without the perjury charge, as evidence of the prior existence of a conspiracy. Furthermore, the form of its presentation was proper. *Anderson* v. *United States,* 417 U.S. 211, 219-220 (1974). Additionally, petitioner is incorrect when he states that the trial court refused to permit additional relevant portions of his prior testimony to be read to the jury. (Tr. 1217, 1301-1304).

Petitioner also alleges that he was prejudiced by the denial of his severance motion since the petit jurors were thus aware that the grand jurors had believed petitioner had lied, under oath, during prior court proceedings. Petition at 18. This same argument was raised and rejected in *United States* v. *Pacente,* 503 F. 2d 543 (7th Cir. 1974), *cert. denied,* 419 U.S. 1048 (1974) and *United States* v. *Isaacs,* 493 F. 2d 1124 (7th Cir. 1974), *cert. denied,* 417 U.S. 976 (1974). As in *Isaacs,* petitioner herein *voluntarily appeared* in a suit instituted by him and proceeded to perjure himself.

Finally, petitioner argues that a severance should have been granted because, "[T]he joinder [of the charges] impossibly confounded his ability to defend the multiple charges by

eliminating the possibility of his choosing to testify on less than all of the charges." Petition at 18. Left unsaid, however, is the fact that this argument was not raised in the trial court. (R. 103, 314-315). The failure to specifically set forth this ground for severance in the trial court precluded him from raising the issue in the Illinois Appellate Court. *People* v. *Massarella,* 80 Ill. App. 3d 552, 400 N. E. 2d 436, 449 (1st Dist. 1979) citing with approval *People* v. *Jackson,* 4 Ill. App. 3d 698, 281 N. E. 2d 373, 376-377 (1st Dist. 1972). Clearly, what petitioner could not directly raise below cannot be raised indirectly in this Court. In any event, petitioner's allegation would fail even if this Court were to reach its merits. *Bradley* v. *United States,* 433 F. 2d 1113, 1118 (D.C. Cir. 1969).

It is therefore submitted that the trial court properly denied petitioner's motion to sever. Moreover, petitioner has not shown that his federal constitutional rights were violated by the trial court's ruling.

III.

PETITIONER HAS NOT BEEN DEPRIVED OF ANY FEDERAL CONSTITUTIONAL RIGHTS WHERE, AFTER A FULL BRIEFING AND ORAL ARGUMENT ON THE MERITS OF PETITIONER'S FIFTEEN ISSUES ON APPEAL, THE APPELLATE COURT OF ILLINOIS CHOSE NOT TO GO INTO ANY DETAIL AS TO THE REASONS WHY IT REJECTED SIX OF THE SAID ISSUES.

Finally, petitioner, perhaps wishing to add more bulk to his Petition for Writ of Certiorari, argues that the method by which the Appellate Court of Illinois, First Judicial District, chose to dispose of six of the fifteen issues raised on appeal, "in effect, deprived petitioner of his right to meaningful appellate review". Petition at 19-26.

Petitioner cites no authority for his position, nor could he, since his assertions are patently erroneous. In the instant case, prior to its decision the Illinois Appellate Court heard oral

argument and had before it extensive briefs on the merits.[3] Its opinion in this case takes up some 13 pages of North Eastern Reporter, 2d Series. 400 N. E. 2d at 441-453. (The Appellate Court's initial decision took up another eight pages. 368 N. E. 2d at 508-515).

The Appellate Court clearly noted that, "Having carefully reviewed the record [which was in excess of 2,500 pages] and the authorities cited by the defendants, we find no merit in these contentions and no necessity to discuss them here." *People* v. *Massarella,* 80 Ill. App. 3d 552, 400 N. E. 2d 436, 450 (1st Dist. 1979). Surely, our system of justice does not require that a reviewing court explain, in detail, its reasons for rejecting frivolous issues. At the very least, petitioner can conclude that the Appellate Court chose to reject these six issues for the reasons stated in the State's brief (see pages 77-91 of the brief filed by the People of the State of Illinois in the Illinois Appellate Court).[4] In any event, the issues which petitioner alleges to have involved federal constitutional rights are really evidentiary matters of which this Court need not concern itself. Since the underlying issues present no federal constitutional question, clearly the manner in which the Illinois Appellate Court reviewed and disposed of them would not itself present an issue for review on certiorari.

It is therefore submitted that petitioner has not been deprived of any federal constitutional rights by the actions of the Appellate Court of Illinois, First Judicial District.

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[3] Petitioner's initial brief was 120 pages in length; the State's brief was 106 pages in length and petitioner's reply brief was 29 pages in length.

[4] Because petitioner has set out his arguments on these issues, respondents have included herein, as an Appendix, a copy of the arguments made by them in the Appellate Court of Illinois, First Judicial District.

CONCLUSION

For the foregoing reasons, respondents pray that the instant Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

9.

THE TRIAL COURT CORRECTLY EXCLUDED IMPROPER DEFENSE EVIDENCE.

A. Objections To The Testimony Of Defense Witness Milton Lambert Were Properly Sustained.

Massarella contends that he was denied his constitutional right to present a defense when the trial court sustained objections to testimony from an alleged expert witness, Milton Lambert, a wholesale distributor of motor fuel products and a business associate of Massarella's who had no personal knowledge of Massarella's business prior to 1972. (Tr. 1674, 1703, 1684. 1711, 1705-1718).

The defendants called Lambert to testify, as an expert witness, that given the physical characteristics and operation of BJTS the business could not have sold the amount of diesel fuel charged by the State. (Tr. 1671).

An expert witness is qualified if because of his skill, training, and experience he is better able to form an accurate opinion as to matters under consideration than is the average member of the community. *People v. Mackins*, 17 Ill. App. 3d 24, 308 N.E.2d 92, 104 (1st Dist. 1974); *Craft v. Acord*, 20 Ill. App. 3d 231, 313 N.E.2d 515, 519 (4th dist. 1974); *People v. Stampelton*, 4 Ill. App. 3d 477, 281 N.E.2d 76, 78-79 (3d Dist. 1972). Expert testimony should not be admitted into evidence where no foundation has been laid for its admission. Where expert testimony is based on personal knowledge of conditions subsequent to the time of the crime, no proper foundation is established. *People v. DeStephano*, 30 Ill. App. 3d 935, 332 N.E.2d 626, 631-632 (1st Dist. 1975). Nor is a proper foundation laid by use of a hypothetical question which assumes facts not in evidence; a hypothetical question must be limited to facts supported by evidence in the record. *People v. Yonder*, 44 Ill. 2d 376, 256 N.E.2d 321, 326 (1970); *People v. Graham*, 25 Ill. App. 3d 853, 323 N.E.2d 441, 445 (3d Dist. 1975). Finally, whether a witness is qualified as an expert is largely in the discretion of the trial court. *Craft v. Acord, supra; People v. Stapleton, supra.*

As a result of the defendants' violation of the discovery rules (Tr. 1670-1672), the State was permitted to examine Lambert on the record prior to his testimony before the jury. (Tr. 1670-1701). Under examination by defendants' own attorney, Lambert revealed that he had no personal knowledge of BJTS during the prosecution period. (Tr. 1684). Based on the proposed hypothetical Lambert could not give an opinion on the level of

business at the truck stop. (Tr. 1697). He testified that in order to give an opinion he would need to know how much fuel was being sold to the truck stop—the very point on which his testimony was meant to focus. (Tr. 1697).

By Lambert's own testimony, outside the presence of the jury, that he had no personal knowledge prior to 1972 and that he was unable to answer the hypothetical question posed by the defense, it was apparent that he was not qualified as an expert and that no proper foundation could be laid for expert testimony.

Not only was Lambert not qualified by personal knowledge or expertise to testify, the hypothetical questions propounded to him both outside and in the presence of the jury consisted almost entirely of facts not in evidence. (Tr. 1695-1697, 1717-1718).

Defendants' attempt to compare Lambert with Milam Harpham, a witness for the State, is irrelevant and incorrect. Harpham was called for the limited purpose of establishing that #1 and #2 heating oil was the same product as #1 and #2 diesel fuel. (Tr. 159, 163). He was shown to be qualified to give such an opinion and later testimony from several witnesses including Massarella himself established the point beyond dispute. (Tr. 157, 165-166, 199-200, 297, 1425, 1500, 1512, 1667, 1982, 1989-1990).

The State's objections and the sustaining of them by the trial court were proper.

B. The State's Objection To Hearsay Testimony Was Properly Sustained.

Massarella contends that he was denied his constitutional right to present evidence on his own behalf when the trial court sustained an objection to testimony from Myron Fertel, the defendants' accountant, concerning a statement made to Fertel by Massarella. (Defendants' Brief at 77-79).[15]

Massarella's alleged statement to his accountant was a conclusion and a self-serving declaration made by Massarella in 1970 when he was stealing hundreds of thousands of dollars from the State and had every reason to fabricate. The statement was offered for its truth and was inadmissible hearsay by a declarant who, while present in court, had indicated no intention to testify. The objection was properly sustained.[16]

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[15] "A. Well, primarily, what I did was to show him what the gross margins were on gasoline in '69. 1970, and went over that with him. He told me that his gross margins should have been higher.

Mr. Gildea: Objection; hearsay.

The Court: Sustained." (Tr. 1769).

[16] Defendants' reliance upon *United States v. Shavin*, 287 F.2d 647 (7th Cir. 1961), (Defendants' Brief at 78), would seem more appropriate to an argument that the court failed to instruct the jury concerning the evidentiary weight of summarization exhibits, People's Exhibits 53 and 54. Such an argument, however, would be based not on any error by the trial court but upon the incomplete record submitted by defendants. The State tendered an instruction based upon *United States v. Shavin, supra*. (People's Instruction 32; S.R. #3 at 129). The defense objected to the instruction and it was therefore refused by the court and withdrawn by the State. (Tr. 2039; S.R. #3 at 129; S.R. #4 at 23). The defense did not object to the withdrawal and offered no alternative instruction. (S.R. #3 at 131-150; S.R. #4 at 23-24).

C. Defendants' Exhibit 33 Was Properly Refused.

Defendants contend that the trial court refused "crucial defense evidence"—Defendants' Exhibit 33, an uncertified, unauthenticated photocopy of what the defense claimed was a public record.

Defendants' Exhibit 33 was represented by defense counsel to be an application for registration of a truck bearing the signature of Gino Fortuna. (Tr. 1872). Without laying any foundation and without placing the document in evidence, defense counsel attempted to describe it in the presence of the jury and question defense witness Massarella concerning it. (Tr. 1871). The State objected to discussing and describing a document in the presence of the jury which was not in evidence and which was uncertified and unauthenticated. (Tr. 1872-1875). Defense counsel was permitted to elicit from Massarella that the signature was Gino Fortuna's. (Tr. 1875). The defense offered no further evidence to authenticate the document and when it was offered into evidence, it was refused. (Tr. 1876, 1996-1997).

Defendants assert that "numerous exhibits proffered by the State were admitted despite the fact that they were mechanically reproduced copies rather than originals without the State's having accounted for the originals." (Defendants' Brief at 80). Defendants cite a single page in the record, Tr. 150. The documents there under discussion were photocopies of Department of Revenue records which were received in evidence only after testimony from a Department of Revenue employee established that the photocopies were prepared by her from public records under her custody and control which by departmental policy could not be removed from the Department of Revenue. (Tr. 128-144, 150). Unlike the defense, the State laid a proper foundation for the introduction of the public records. *People v. White*, 24 Ill. App. 2d 324, 164 N.E.2d 823, 827 (2d Dist. 1960).

Even assuming it was valid, Defendants' Exhibit 33 merely restated facts already in evidence and not in dispute. Gino Fortuna had already testified that he was president of Mideast Transport, Inc., the articles of incorporation of Mideast Transport, Inc., reflecting that fact had already been placed in evidence by the State, and Louis Wright had testified that Fortuna signed the transfer of title for the White tractor as president of Mideast Transport, Inc., when Massarella sold the truck to Wright. (Tr. 597, 660, 670, 829-830). The State's case showed that while Fortuna was president of Mideast and Mideast owned the White tractor used to haul fuel to BJTS, Mideast Transport, Inc., itself was owned and controlled by Massarella.[17]

Defendants' Exhibit 33, an unauthenticated photocopy of no evidentiary value, was properly refused.

10.

THE TRIAL COURT CORRECTLY SUSTAINED OBJECTIONS TO IMPROPER DEFENSE CROSS-EXAMINATION.

Defendants contend that the trial court deprived them of their Sixth Amendment right to confront witnesses by improperly limiting the cross-examination of four State's witnesses: James Peterson, Louis Wright, Investigator Anthony Weeditz, and Gino Fortuna.[18] (Defendants' Brief at 81).

Defendants claim that each of the questions asked of the four witnesses to which objections were sustained

[17] Massarella's ownership and control was shown through the testimony of at least 10 witnesses and by two admissions of Massarella himself. (Tr. 448-457, 465-493, 527-536, 548-563, 597-604, 771-789, 826-830, 1018-1036, 1107-1110, 1366).

[18] The relevant testimony as to each witness appears in the Appendix at 30a-56a.

were intended to show interest or bias of particular witnesses. The claim is a blatant fiction, unsupported by the questions themselves or any argument, offer of proof, or showing of any kind in the record. Each of the questions was improper in form, sought information that was obtained in subsequent questions, assumed facts in dispute or not in evidence, or attempted to put the defendants' theory of the case before the jury. The trial court did not abuse its discretion in sustaining the State's objections to such questions. *People v. Moore*, 51 Ill. 2d 79, 281 N.E.2d 294, 297 (1972); *People v. Rossini*, 25 Ill. 2d 617, 185 N.E.2d 831, 833 (1962); *People v. Needham*, 22 Ill. 2d 258, 174 N.E.2d 838, 839 (1961); *People v. Moretti*, 6 Ill. 2d 494, 129 N.E.2d 709, 725-726 (1955); *Bryntesen v. Carroll Construction Company*, 27 Ill. 2d 566, 190 N.E.2d 315, 317 (1963). See, *People v. Clay*, 27 Ill. 2d 27, 187 N.E.2d 719, 720 (1963).

Defendants' claim that certain questions asked of Investigator Anthony Weeditz were meant to show that Peterson in fact had been investigated is also unsupported by the questions themselves or by any statement or offer of proof in the record. (Defendants' Brief at 87). Having made that unsupported assertion, defendants then claim that inquiry as to whether a State's witness has been investigated by a government agency is proper cross-examination. Both the Illinois Supreme Court and the Seventh Circuit have specifically held to the contrary. *People v. George*, 49 Ill. 2d 372, 274 N.E.2d 26, 31 (1971); *United States v. Amabile*, 395 F.2d 47, 51 (7th Cir. 1968), vacated sub nom. *United States v. Battaglia*, 394 U.S. 310 (1969), appeal after remand 432 F.2d 1115 (7th Cir. 1970).

Finally, the defendants assert that the trial court's rulings limited cross-examination of both Peterson and Wright by preventing defense counsel from

demonstrating that they had violated the law and had an interest to avoid prosecution. Assuming *arguendo*, that any conduct of either Wright or Peterson had been unlawful, the last transaction between Peterson Oil Company and Massarella's Rella Enterprises occurred in May, 1971. (Tr. 385). Wright's last involvement with Massarella was his testimony in the injunction suit in August, 1971. (Tr. 834-835). When Wright and Peterson testified in October, 1974, even the felony statute of limitations had long since expired. Ill. Rev. Stat., Ch. 38, § 3-5(b) (1973).

Determination of the permissible latitude of cross-examination rests in the discretion of the trial court. Only in a case of clear abuse of such discretion, resulting in manifest prejudice to the defendants, should a reviewing court interfere. *People v. Halteman*, 10 Ill. 2d 74, 139 N.E.2d 286, 294 (1957). Each of the four State's witnesses were cross-examined at great length. (Tr. 413-436, 442-445, 649-684, 699-735, 762-765, 838-866, 1380-1467). The defense was given a full and complete opportunity to go into every phase of the witnesses' direct examination and the defense was not unreasonably restricted.[19] The defendants' assertions not only fail to show manifest prejudice, they fail to show any error at all.

[19] The trial court even offered to permit defense counsel to call Investigator Weeditz during the defense's case to pursue matters to which the court had sustained objections. (Tr. 1468-1469). Defense counsel did not do so.

11.

THE TESTIMONY OF A CO-CONSPIRATOR DESCRIBING HIS ACTS SUBSEQUENT TO THE TERMINATION OF THE CONSPIRACY WAS PROPERLY ADMITTED AGAINST ALL DEFENDANTS AS EVIDENCE OF THE PRIOR EXISTENCE OF THE CONSPIRACY.

Raymond Battersby, a co-defendant and co-conspirator who pleaded guilty to conspiracy to commit theft and perjury prior to trial,[20] testified for the prosecution. (Tr. 295, 294-383).

In August, 1971, Battersby was subpoenaed by Massarella's attorney and was a witness for the plaintiff in *Bee Jay's Truck Stop, Inc. v. Illinois Department of Revenue*, No. 71 CH 3608 (Circuit Court Cook County, Chancery Division 1971). (Tr. 333). He testified on August 24 and 30, 1971, subsequent to the termination of the conspiracy on May 31, 1971. (People's Exhibit 33, 55). Battersby's plea of guilty to perjury was for that testimony. (Tr. 20, 197).

At trial, over defense objection, Battersby testified that in the former proceeding he had stated that from 1967 to 1971 he sold three million gallons of fuel to Raymond Weglowski's Midwest Fuel Transportation, that he paid Gino Fortuna $30 per load to haul the fuel, that he did not sell BJTS any fuel, and that no fuel was hauled to 39th and Morgan, the location of BJTS. He testified at trial that that prior testimony was false. (Tr. 333-335, 338-340, 357-358).

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[20] In addition, Mid-Town Petroleum, Inc., a corporation of which Battersby was president and principal owner (Tr. 294-295), pleaded guilty to conspiracy to commit theft. On behalf of himself and his corporation, Battersby paid $111,000 in restitution and fines and was placed on three years conditional discharge. (Tr. 295-296, 348-349, 355-356; R. 196-197)

Citing *Krulewitch v. United States*, 336 U.S. 440 (1949), the defendants contend that acts or declarations of a co-conspirator after termination of the conspiracy are not admissible against other conspirators. Defendants misstate the law. *Krulewitch, supra*, applies only to the admissibility of co-conspirators' hearsay statements. Acts and conduct of a conspirator, not consisting of hearsay declarations, are admissible to prove the prior existence of the conspiracy even though occurring after the termination of the conspiracy. *Anderson v. United States*, 417 U.S. 211 (1974) (perjurious sworn testimony of two conspirators subsequent to termination of conspiracy introduced against all defendants to show prior existence of conspiracy); *Lutwak v. United States*, 344 U.S. 604, 617-618 (1953); *United States v. Bermudez*, 526 F.2d 89, 95-96 (2d Cir. 1975); *United States v. Tramunti*, 513 F.2d 1087, 1115-1116 (2d Cir. 1975); *United States v. Marquez*, 424 F.2d 236, 238, 239 (2d Cir. 1970); *United States v. Bennett*, 409 F.2d 888, 893 (2d Cir. 1969); *United States v. Birnbaum*, 373 F.2d 250, 259-260 (2d Cir. 1967).

Thus, the testimony of co-conspirator Battersby describing his acts subsequent to the termination of the conspiracy was properly admitted against all defendants as evidence of the prior existence of the conspiracy.

12.

THE TRIAL COURT PROPERLY ADMITTED THE PRIOR TESTIMONY OF A DECEASED STATE'S WITNESS.

A. The State Established That John Gavin, Sr., Was Dead.

The defendants contend that their Sixth Amendment right to confrontation of witnesses was violated when the State read to the jury the testimony of John Gavin, Sr., given on behalf of the plaintiff on August 24, 1971, in the case of *Bee Jay's Truck Stop, Inc., and Illinois Gasoline Dealers Assn. v. Illinois Department of Revenue, George Mahin, and Anthony Weeditz*, No. 71 CH 3608 (Circuit Court of Cook County, Chancery Division). (Tr. 526-547). Prior to trial the defendants stipulated to the admissibility, subject only to relevance and materiality, of the entire pleadings, orders, and transcript of the civil suit and those documents were subsequently admitted into evidence without objection. (Tr. 1195, 1206, 1219-1220; R. 275; People's Exhibits 62, 55-59, 33). Nevertheless, defendants objected at trial to reading the testimony of John Gavin, Sr. to the jury. (People's Exhibit 55 at pp. 79-88; Tr. 503).

The defendants' contention that the State failed to establish that John Gavin, Sr., was dead is without merit. The State placed in evidence a certified copy of the death certificate of John D. Gavin. (Tr. 511; People's Exhibit 43). The death certificate showed the date of death as November 30, 1973, and the occupation of the deceased as sales manager in the petroleum industry. (People's Exhibit 43). These facts were cognizable by the trial court. *People v. Fiddler*, 45 Ill. 2d 181, 258 N.E.2d 359, 361 (1970); Ill. Rev. Stat. Ch. 111½, § 73-25 (1973).

The witness described himself in the transcript as John Gavin, Sr., sales manager for Oils, Inc., and president of Great West Truck Lines. (Tr. 527; People's Exhibit 55 at 79). Ruth Francisco, who testified at the criminal trial prior to the reading of the transcript, stated that she was employed by Great West Truck Lines, Inc., from 1966 to 1971, that her immediate superior was John Gavin, that he was the owner and president of the company, that John Gavin was deceased, and that he signed his name "John D. Gavin." (Tr. 465-466, 479, 494).

The pleadings and orders in the civil suit include the subpoena issued to

> "Mr. John Gavin, Sr.
> 2058 W. 103rd St.
> Chicago, Illinois (home)
> 14200 Western
> Posen, Illinois
> (7 p.m. to 11 p.m.)"
>
> People's Exhibit 62 at p. 40.

The death certificate of John D. Gavin shows the address of his surviving spouse as 2058 W. 103rd St., Chicago, Illinois. (People's Exhibit 43). Investigator Weeditz testified on cross-examination that Great West Truck Lines was located in Posen, Illinois, in the area of 142nd and Western Avenue. (Tr. 1395).

The use of testimony given at a previous trial does not violate the right of confrontation where the witness is now dead. *Mattox v. United States*, 156 U.S. 237 (1895); *George v. Moorehead*, 399 Ill. 497, 78 N.E.2d 216 (1948). Identity of name between the death certificate and the person who had earlier testified raises a presumption of identity of person. *Vander Veen v. Yellow Cab Co.*, 89 Ill. App. 2d 91, 233 N.E.2d 68, 71 (1st Dist. 1968); *Anderson v. Anderson*, 292 Ill. App. 421, 11 N.E.2d 216,

219 (1st Dist. 1937); *Bell v. Bankers Life and Casualty Co.*, 327 Ill. App. 321, 64 N.E.2d 204, 208 (1st Dist. 1945); *Breznik v. Braun*, 11 Ill. 2d 564, 144 N.E.2d 586, 588 (1957); *People v. Lawson*, 331 Ill. 380, 163 N.E. 149, 154 (1928).

The State established identity not only of name, but of occupation, business, home address, and business address as well. The defense presented no evidence to rebut the presumption.

B. The Parties And Issues In The Present And Former Proceedings Were Substantially Identical.

Defendants further contend that John Gavin's prior direct testimony, given on behalf of BJTS in the civil proceeding and read to the jury in the present case (Tr. 526-547), was inadmissible since Massarella was not a party to the prior proceeding and neither the parties nor the issues were identical to those in the present case. (Defendants' Brief at 98).

The issue is not properly before this Court. The defendants stipulated to the admissibility of the civil proceeding transcript and it was admitted without objection. (R. 275-276; Tr. 1195, 1206, 1219-1220; People's Exhibit 62, 55-59, 33). The stipulation between the parties with respect to the incorporation of the record in the previously tried and decided case relieved the State of any further necessity to prove identity of issues or parties and eliminated any basis for complaint on appeal. *People v. Pembrock*, 23 Ill. App. 3d 991, 320 N.E.2d 470, 474-475 (1st Dist. 1974); *People v. Miles*, 13 Ill. App. 3d 453, 300 N.E.2d 822 (1st Dist. 1973); *Charles H. Demarest Inc. v. United States*, 174 F. Supp. 380, 385-386 (Cust. Ct. 1959) (and cases cited therein).

Assuming, *arguendo*, that the issue is properly before this Court, it is meritless. The test for whether former testimony is admissible as an exception to the hearsay rule is whether the party against whom the testimony is offered had a reasonable opportunity to cross-examine. McCormick, *Evidence*, 1972 ed., sec. 255. As to the identity of the parties, all that is essential is that the present opponent had a fair opportunity of cross-examination. A change of parties which does not affect such a loss does not prevent the use of the testimony. *People v. Jackson*, 41 Ill. 2d 102, 242 N.E.2d 160 (1968); *McInturff v. Insurance Co. of North America*, 248 Ill. 92, 93 N.E. 369, 370 (1910). The opportunity for direct and redirect examination is the equivalent of an opportunity for cross-examination.

> "If party A calls and examines a witness in the first hearing, and this testimony is offered against A in a second trial, may it come in against the objection of want of opportunity to cross examine? The decisions sensibly hold that it may. [cases cited.]" McCormick, *Evidence*, 1972 ed., sec. 255.

The plaintiff in the prior proceeding was BJTS.[21] (People's Exhibit 62). The plaintiff's complaint was signed by Massarella as president of BJTS, one of the capacities in which he was indicted and convicted. (R. 8, 22). BJTS was merely a legal extension of Massarella, himself, who was not only president but the sole shareholder of the corporation. (Tr. 1906-1907, 1917, 2305; R. 337). Massarella was the only representative of the corporate plaintiff to testify at the civil proceeding; he was the only witness to testify without a subpoena, and his testimony consumed nearly one-half of the hear-

[21] An additional plaintiff, the Illinois Gasoline Dealers' Association, was dismissed prior to the hearing. (People's Exhibit 62 at p. 32).

ing. (People's Exhibits 62, 55-58 at 96-434, Exhibit 33 at 674-687).

While identity of counsel in both proceedings is not a condition of admissibility (*People v. Jackson, supra*, at 167) attorney Sidney Goldstein represented the plaintiff in the civil suit and represented all appealing defendants in the criminal case. (People's Exhibit 62; R. 72, 74,85-86). At the civil proceeding Goldstein characterized Massarella as "a principal plaintiff," and Goldstein's closing argument was phrased entirely in terms of Massarella and "his business" without mentioning BJTS by name. (People's Exhibit 55 at 98; People's Exhibit 33 at 687-691).

The issue in the civil case and the criminal case was the same: whether Massarella and his businesses were engaged in a scheme to divert untaxed heating oil to BJTS for sale as taxed diesel fuel. Only the level of proof was different. In the civil case the State merely needed to show sufficient evidence of the scheme to justify an extensive investigation. (People's Exhibits 57 at 318; 58 at 394-403; 59 at 553, 601; 33 at 633-635, 681, 696-704; People's Exhibit 62 at 3, § 6). In the criminal case, the State was required to prove the existence of the scheme beyond a reasonable doubt in order to prove the criminal charges against Massarella and his businesses.

Substantial identity of issues and parties was established and the prior testimony of the deceased witness was properly admitted.